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IN THE

Supreme Court of the United States

No. 72-1603

HAROLD J. CARDWELL, Warden,
Ohio Penitentiary,
Petitioner,

ARTHUR BEN LEWIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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GENERAL DOCKET
United States Court of Appeals
for the
Sixth Circuit

Case No. 72-1679

Date 1972		FILINGS—PROCEEDINGS
June	14	Motion to Appeal in Forma Pauperis and for appointment of counsel
July	10	*Certified record* (3 vols. of pleadings and transcript and 5 vols. of state court transcript), filed; and cause docketed
July	17	*Certified supplemental record* (2 vols. of pleadings), filed
July	17	Appearance of Counsel for Appellant
July	17	Motion for appointment of counsel, memorandum in support thereto, with proof of service
July	17	Appearance of counsel for Appellee

August	9	Order granting appointment of counsel for Appellee (Celebrezze, J.) U-52
August	21	Twenty-five copies of Brief for Appellant, with proof of service
August	21	Ten copies of Appendix for Appellant
September	8	*Certified Supplemental Record* (1 vol. pleadings)
September	15	Motion: Appellee's brief to 10-2-72 (Granted. Final extension)
October	2	Four copies of Brief for Appellee, with proof of service
December	8	Cause argued and submitted (Before: Phillips, Weick and Miller, J.)
January	5	Order appointing counsel for Appellee
April	5	Judgment of the District Court affirmed X-15
April	5	Opinion by Miller, J.
April	27	Motion of Appellant for stay of mandate
April	27	Letter from counsel for Appellant requesting preparation of record for Supreme Court
May	2	Voucher for compensation and expenses of appointed counsel mailed to Administrative Office and copy to counsel
May	3	Certified record for certiorari mailed to Supreme Court
May	15	Order staying mandate thirty days (Phillips, Weick and Miller, J.) Y-2
June	4	Notice of filing petition for certiorari on 5/30/73 (Sup. Ct. 72-1603)
August	22	Motion of Appellee for bond, with proof of service
September	5	Order denying motion of Appellee for bail (Miller, J.) Z-5

September 5 Copy of above order issued to Clerk of the District Court

December 7 Certified copy of order of Supreme Court granting certiorari 12/3/73

IN THE COURT OF COMMON PLEAS

OF DELAWARE COUNTY, OHIO

Case No. 3952

THE STATE OF OHIO,

Plaintiff,

ARTHUR BEN LEWIS, JR.,

Defendant.

TRANSCRIPT OF TESTIMONY

Before O. W. Whitney, Jr., Judge, on Thursday, January 25, 1968.

Appearances:

Mr. R. Kenneth Kunkel, Prosecuting Attorney, and Mr. David R. Kessler, Special Assistant Prosecuting attorney, on behalf of the Plaintiff, the State of Ohio.

Mr. Paul A. Scott, on behalf of the Defendant, Arthur Ben Lewis, Jr.

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Witnesses:

CYLDE MANN

Called as a witness, by and on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

Cross Examination

By Mr. Scott:

Q. Would you state your name, please? A. Clyde Mann.

Q. And your present address? A. Dublin, Ohio, Route 1.

Q. Mr. Mann, with whom are you associated? A. With the Division of Criminal Activities, Attorney General's Office.

Q. And in what capacity do you so serve? A. Chief investigator.

Q. And were you so employed and serving in that capacity on October 10, 1967? A. I Was.

Q. As chief investigator for the Attorney General's staff, are you a police officer? A. Not a so-called police officer. No police powers.

Q. Now, Mr. Mann, directing your attention to the late afternoon of October 10, 1967, at the office of the Attorney General, Criminal Activities Division, were you present, at that time? [4] A. Yes.

Q. And would you state for the record who else was present; either there, or in the office at that time that had any contact with Mr. Ben Lewis. A. Sergeant Lavery and James Heise.

THE COURT: Would you spell that last name?

THE WITNESS: H-e-i-s-e.

THE COURT: Thank you. Go ahead. A. Mr. Kessler, Ed James.

Q. Is that basically all who were there? A. Well, Mr.

Scott—yourself, was there. Mr. Tingley was there later on that day.

Q. And of course, Mr. Lewis? A. Mr. Lewis.

Q. Now, Mr. Ed James is whom? A. He is a legal aide with the Attorney General's Office.

Q. He is not a police officer? A. No.

Q. Mr. Kessler, I assume we can take notice that he is the attorney and chief of this Division? A. That is correct.

Q. Mr. Heise, James Heise, who is Mr. Heise? A. He is employed in the same division as an investigator. [5]

Q. In the same capacity as you are, only you are the Chief of Investigation? A. That is correct.

Q. And Sergeant William Lavery, he is a duly authorized acting police officer for the County of Delaware, Sheriff's Department; is that right? A. That is correct.

Q. Now, at that time, Mr. Mann, the subject matter that was under investigation, at that time, was an alleged murder that took place on or about July 19, 1967; is that correct? A. That is correct; yes.

Q. And the time that we are speaking about at the present was in the offices of the Attorney General, that took place on October 10, 1967? A. Yes.

Q. Mr. Mann, could you tell me when you first entered into the investigation of this particular crime? A. Sometime in the latter part of August.

Q. Now, were you present when Sergeant Lavery served the warrant of arrest on Arthur Ben Lewis? A. Yes.

Q. And did that take place in the office of Mr. David Kessler? A. His office, or in the hallway just outside the office. [6]

Q. Mr. Mann, after Mr. Lewis was apprehended and

arrested, did you have any conversation with Mr. Lewis concerning a file that he had in his possession, and his automobile? A. Yes.

Q. Now, this was after he was arrested? A. No, before.

Q. After he was arrested did you make a demand upon Mr. Lewis for his automobile and his file?

MR. KESSLER: I object.

THE COURT: Go ahead.

MR. KESSLER: Mr. Scott keeps bringing up about a file. This is a motion as to the automobile, and the file has nothing to do with it. And subsequently, I will object to any questions or answers regarding a file.

THE COURT: Counsel for the Defendant asked that the Court hear these motions separately. Now, the Court is going to try to do it. Where is the file pertinent here, Mr. Scott?

MR. SCOTT: Well, as it relates to the context. If I ask the question about did you have a conversation about an automobile, the answer can be no, I had a conversation with him about an automobile and a file.

MR. KESSLER: May it please the [7] Court.

I am sorry. Go ahead.

MR. SCOTT: In many instances, I have been cautious in the manner which my questions are asked to Mr. Mann, because they require explicit questioning rather than vague generalities.

THE COURT: You aren't indicating to this Court that law enforcement officers or an employee of the Attorney General's Office would say that he hadn't talked about a car if he actually talked about a car and a file? Do you take that position here?

If that witness takes that position, he'd better not.

MR. SCOTT: All right. We can eliminate the file completely.

THE COURT: All right. Thank you.

Q. Did you have a conversation, or did you make a demand upon Ben Lewis, after he was arrested, for the automobile? A. Yes.

Q. What did you say to him? A. I don't know if I asked him for the car—I stated that I was going to impound the car because it was used in a felony. That was the time you was present, when this statement [8] was made.

Q. Did you, at that time, Mr. Mann, have a search warrant for the automobile of Arthur Ben Lewis? A. No.

Q. The statement that you have indicated that you are going to impound the car because it was used in the commission of a felony, did that statement come as a result of a question from myself? A. At that time, no, not that I recall.

Q. Did you have any conversation with the undersigned as it related to the automobile inquiring as to what authority do you have in taking this car? A. Did you ask me that question?

Q. Yes, sir. A. I don't recall you asking me that question.

Q. Pardon? A. I don't recall you asking me that question. If you did, the only thing I remember saying to you, at that time, was this car was being impounded because it was used in a felony.

Q. All right. Do you recall any other conversations that you had with me concerning that automobile after the arrest was made by Sergeant Lavery? A. I don't exactly know just what you mean.

Q. Well, as it pertains to the seizure of the automobile. A. Nothing further, that I recall. [9]

Q. Mr. Mann, was the automobile, in fact, impounded as the results of this particular incident? A. Yes.

Q. And did you cause it to be impounded? A. Well, if you mean me direct, it was a talk between Sergeant Lavery, myself and Mr. Kessler. From our talk between the three of us, from that effect, it was impounded.

Q. Are you inferring, in any way, that Sergeant Lavery had anything to do with the impounding of this automobile? A. Yes.

Q. You are? A. Yes.

Q. Did you, at any time, ever observe—strike that.

Were you, at any time, working under any type of instructions from Sergeant Lavery, as to the impounding of that automobile? A. It was his suggestion that this car should be impounded because it was used in a felony.

Q. It was his suggestion? A. Well, between all of us talking it over.

Q. No, I am talking about Sergeant Lavery. Are you telling me that it was his suggestion, or that you were working under his explicit orders to impound that car, or were you working under your own determination? A. It was a mutual agreement between both of us. [10]

Q. Did he do anything to impound the vehicle or consumate the seizure of that vehicle; Lavery, himself? A. No. The Columbus Police Department was called to actually pick up the car.

Q. And who called the Columbus Police Department? A. I believe Mr. Heise made the call to the Police Department.

Q. So the answer to the question would be no, you were not acting under orders of Sergeant Lavery on the seizure of the automobile? A. No, I was not acting on orders.

MR. SCOTT: I think that is all I have, Mr. Mann.

THE COURT: All right.

MR. KESSLER: Just a couple of questions, Your Honor, if I could.

Direct Examination

By Mr. Kessler:

Q. Did you have any conversation, Mr. Mann, with the Defendant regarding a request by him to take his car and put it someplace? A. Yes; I did.

Q. And what was that conversation? What did the Defendant say, in other words? [11] A. He asked me to have his car impounded, or put in a police lot for safe keeping, because the lot that he had it in, which was next door to our office, he didn't want it to sit there over night, afraid somebody would ramsack the car, and take any merchandise that he had in the car out of the car. He asked me to have it impounded for safe keeping.

Q. Now, Mr. Mann, did you, in your own mind, feel that this car had been used in an alleged felony? A. Yes.

MR. KESSLER: That is all.

THE COURT: Mr. Scott.

Recross Examination

By Mr. Scott:

Q. Mr. Mann, the conversation that you are talking about as it relates to Mr. Lavery, was prior to the time of the arrival of his counsel; is that correct?

I wasn't there when that conversation took place, was I? A. No.

Q. In fact, after I arrived there, you had no direct conversation with Mr. Lewis at all, did you? A. No, no.

Q. He was not under arrest, at that time, was he? A. The warrant had not been served on him at that time, [12] no.

Q. In fact, you had never disclosed to him that he was going to be arrested, at that time, had you? A. Yes.

Q. When did you dislose that to him? A. That was after he made a call to you, or Mr. Tingley, I don't know which.

Q. All right. But the conversation concerning the automobile was even before he had made a call to his attorney; is that correct? A. This I don't recall exactly.

Q. Well, now, Mr. Mann, getting specific about this, you seized the automobile because you felt that it was used in the commission of a felony; is that correct? A. That is correct.

Q. And that is the authority which you exercised the seizure of that automobile? A. That is correct.

MR. SCOTT: That is all.

THE COURT: Anything else, Mr. Kessler?

MR. KESSLER: Nothing, Your Honor.

THE COURT: This Court, perhaps, has a right to take some note of the fact [13] that this witness has had some experience in the field of law enforcement, and this Judge would be, I am certain, correct in assuming that depositions, and other information that you attorneys have available, shows that this man has had some experience in the field of law enforcement.

In view of the Court's remarks earlier in this record as to what this Court would or would not expect to hear in the way of answers, how many years experience did you have with some of the law enforcement authorities in Franklin County, Ohio?

THE WITNESS: Approximately 18 years.

THE COURT: And that was just prior to going with the Attorney General's Office, here?

THE WITNESS: Yes, sir.

THE COURT: Anything else, Mr. Scott?

MR. SCOTT: No, sir.

THE COURT: Mr. Kessler?

MR. KESSLER: No, sir.

THE COURT: Thank you, sir.

(Witness excused.)

THE COURT: Would you want to [14] have the Bailiff ascertain whether or not Mr. Lavery is here?

MR. SCOTT: Yes, sir.

THE COURT: Would you check, please, sir.

THE BAILIFF: He has not shown up yet, Your Honor.

THE COURT: Mr. Scott, the Bailiff reports that he has not arrived here yet. Do you want a recess?

Off the record. (Discussion had off the record.)

THE COURT: Back to your record.

DAVID E. TINGLEY

Called as a witness by and on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Scott:

Q. Would you state your name for the record? A. David W. Tingley.

Q. And your address? A. 1856 Willow Forge Drive.

Q. Your profession? [15] A. Attorney at law.

Q. Licensed to practice in the State of Ohio? A. Yes, sir.

Q. Mr. Tingley, did you observe and witness the facts surrounding the seizure of Arthur Ben Lewis' Pontica automobile? A. I was not physically present at the actual seizure. I witnessed the events by which the authorities there obtained possession of the keys and the parking ticket of the automobile.

Q. All right. Now, in particularly, where did this take place? A. In the office of the Attorney General in the University Building. I believe it is 40 South Third.

Q. And what date did this take place? A. I do not remember the date of the arrest.

Q. Would it be at that time when Mr. Kessler, Sergeant William Lavery, Jim Heise, Ed James, myself and you were present and Mr. Lewis was there at the Attorney General's office? A. It was.

Q. Would that be October 10, 1967, to the best of your recollection? A. I believe so.

Q. Would you relate to the Court those events that took place as it relates to the seizure of the automobile? A. It was about 5:30. The arrest of Mr. Lewis had been made by Sergeant Lavery. Ben Lewis was in custody. At the [16] time we were about to depart, Clyde Mann indicated to you that he wanted possession of some books and records that Mr. Lewis apparently brought with him, and the automobile. You indicated to Mr. Mann that the books and records — that you had been employed —

MR. KESSLER: May it please the Court, again, I know Mr. Tingley wasn't in here to see the Court's previous ruling, but I will again make an objection as to the books and records.

THE COURT: Mr. Scott, do you care to be heard?

MR. SCOTT: No.

THE COURT: Sustained.

What the Court had indicated, in view of the procedure here, Mr. Tingley, insofar as possible, this would be confined, at the present time, to the evidentary matters pertinent to the Pontiac automobile.

A. All right, sir.

Among other things that Clyde Mann demanded possession of, was the automobile that Mr. Lewis had apparently driven downtown that day.

He said to you, Mr. Scott, again, among the things that he requested, "I want the automobile."

You asked him under what authority he wanted the automobile, and he said, "It was used in the commission of a [17] felony."

You said words to the effect, "I am not going to enter into a physical fight with you here if you are taking custody of the automobile. Here are the keys."

And you got the parking ticket from Mr. Lewis and gave it to Clyde, as I remember.

MR. SCOTT: You may inquire.

THE COURT: Go ahead, sir.

Cross Examination

By Mr. Kessler:

Q. The only question I have, just to clarify everything, you represented Mr. Lewis; is that correct. A. I represented him for years prior to the arrest.

Q. And on that particular day, to clarify how you were there, he had called you? A. He had called me. And I explained to him, aside from the fact that I was a personal friend, and was, at that time, a part-time member of the Franklin County Prosecutor's staff, that I could not represent him in the defense of a criminal action.

MR. KESSLER: All right. That is all, Your Honor.

MR. SCOTT: Thank you, Dave.

THE COURT: Thank you, gentlemen. [18]

In fairness to the witness, who left the stand, the Court is going to try to help you out time-wise, is he released now, or is he to remain?

MR. TINGLEY: Judge, I am not due back in Columbus until 1:00.

MR. KESSLER: We have no reason why he might remain.

THE COURT: Mr. Scott, do you have any reason why he should remain?

MR. SCOTT: No, Your Honor.

THE COURT: As far as the Court is concerned, you may remain here in the courtroom as a spectator, or you may go back to Columbus and practice law.

MR. TINGLEY: Thank you, sir. (Witness excused.)

THE COURT: The Bailiff will check again for you.

Mr. Fees?

THE BAILIFF: Yes, sir, he is not here. I have been watching.

THE COURT: Mr. Scott, would the Court be correct in assuming that you do want Deputy Lavery next?

MR. SCOTT: Yes, Your Honor. [19] I feel that it is material.

THE COURT: We will then recess until he arrives.

(Short recess.)

THE COURT: You may be seated, ladies and gentlemen.

Mr. Kessler, go ahead, sir.

MR. KESSLER: We want to apologize to the Court for the delay here. We talked to Sergeant Lavery, and I am sure the Court knows that it is unusual for Sergeant Lavery to be late. He was on a call and got detained.

THE COURT: Thank you for your explanation.

WILLIAM B. LAVERY

A witness called by and on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Scott:

Q. Would you state your name, please? A. William B. Lavery.

Q. And where do you reside, Mr. Lavery? A. 39 Spring Street, Delaware, Ohio.

Q. Your present occupation? [20] A. Deputy Sheriff for the County of Delaware, Ohio.

Q. And do you hold any rank or rate? A. Sergeant.

Q. Were you so employed on October 10, 1967? A. Yes; I was.

Q. And at that time, did you happen to be in Columbus, Ohio, in the office of the Attorney General's Criminal Activities Division? A. Yes.

Q. Were you, at that time, armed with a warrant for the arrest of Arthur Ben Lewis, Jr.? A. Yes; I was.

Q. You had previously obtained that warrant on October 10, or the day before? A. I am not sure. I think it was on October 10.

Q. At least sometime in the morning? A. Yes. I recall now. It was on October 10 that I obtained the warrant.

Q. Now, you did serve the warrant on Arthur Ben Lewis, Jr. for the offense as stated in the affidavit, did you not? A. Yes.

Q. Directing your attention to a 1966 automobile, and the seizure of that automobile, did you have anything to do with that part of the transaction? A. Well, I requested, I think it was Mr. Mann, or Mr. [21] Heise — I think Mr. Mann I requested to impound that vehicle. It was parked in a parking lot near the office of the Division of Criminal Activities. And after the arrest was made, I requested, I am sure it was Mr. Mann, to have the vehicle impounded.

Also, as I recall, I think Lewis — Mr. Lewis had asked us to watch the car. He was concerned about it. He didn't want to leave it in that lot. And he asked that we do something with it.

Q. Sergeant Lavery, the conversation that you are talking about between Mr. Lewis and the safe keeping

of the automobile, that was prior to the time that either myself or David Tingley appeared on the scene, was it not? A. I am not sure on that, Mr. Scott.

Q. As a matter of fact, did you have any conversation with Mr. Lewis, at all, after we arrived; Mr. Tingley and myself? A. Well, I spoke to him. I can't recall exactly what may have been said. But I think perhaps I talked to him breifly. I don't think it had to do with the car, however.

Q. Would I be correct in saying that the conversation that you had with Mr. Lewis concerning the safe keeping of his automobile was prior to the time that we arrived? A. Well, I think so, but —

Q. Was Mr. Mann there at this time that you had this conversation with Mr. Lewis? [22] A. Yes.

Q. And that is the only time the subject came up concerning statements, or anything that Mr. Lewis indicated about the safekeeping of his automobile, was when you and Mr. Mann were together? A. Yes.

Q. Okay. Do you remember back on December 19, 1967, here in the courthouse when I was taking your deposition? A. Yes.

Q. Do you remember the question being asked, Page 25, "Did you have anything to do with the automobile part of this transaction?"

Answer: "On October 10?"

Question: "Yes."

Answer: "No."

Do you remember those questions being asked and those answers being given? A. Yes.

Q. Do I understand you correctly now that your testimony is that you had ordered, or had requested that Mr. Mann seize that automobile? A. Well, we — yes, we dis-

cussed it, and decided it should be impounded, in as much as—

Q. Who discussed it? A. As I say, I am sure it was Mr. Mann and myself. [23] And I am not sure if Mr. Heise was there.

Q. But you did not seize the automobile yourself? A. I would say not. I didn't call for the wrecker, or anything like that. We discussed it.

Q. Did you make a request to anybody to take that automobile, other than as you indicated something to Mr. Mann? Did you talk to me about that car? A. No.

Q. Did you talk to Ben Lewis about that car after the arrest had been consumated? A. Not that I recall.

Q. Did you, as an officer of the Franklin — Delaware County Sheriff's Office, did you have in your possession a search warrant? A. No.

Q. For the taking of that 1966 automobile? A. No.

Q. Do you recall any conversation that took place between Mr. Mann and myself as to the authority under which he was seizing that automobile after the arrest had been made? A. I don't recall it, no.

Q. Under what authority did you order Mr. Mann to take the car? A. We discussed it, and I think we mutually agreed.

Q. But you did not order it, as such? [24] A. I don't recall putting it in the form of an order, but we mutually agreed, and I guess you could say that I requested that it be impounded.

Q. You were the only police officer present, were you not? A. Yes.

Q. In your discussions, under what authority did you discuss about taking that automobile?

MR. KESSLER: Your Honor, I object to that. I think that is within the province of the Court to determine as

a result of the testimony presented today. You are asking for a legal conclusion from the witness.

THE COURT: Mr. Scott, do you care to be heard?

MR. SCOTT: I think, surely, the police officers, on taking personal property belonging to other parties, he has admitted discussing and I would like to know under what authority he did take the automobile.

THE COURT: Isn't the question before the Court, whether he had authority?

MR. SCOTT: Well, I suppose so.

THE COURT: Sustained. Ask another question.

Q. I further understand, Sergeant Lavery, that you had [25] nothing else to do with this automobile, other than what you have just related, as it relates to the seizure of the car? A. That is correct.

MR. SCOTT: All right. That is all.

MR. KESSLER: No questions, Your Honor.

THE COURT: That is all, Sergeant. Thank you.

(Witness excused.)

* * * * * * *

IN THE COURT OF COMMON PLEAS
OF DELAWARE COUNTY, OHIO
Case No. 3952
February 20, 1968

STATE OF OHIO

Plaintiff

—vs—

ARTHUR BEN LEWIS, JR.

Defendant

RULING ON MOTION

Whitney, J.

This cause is before the Court on Defendant's Motion filed January 15, 1968 seeking an order "to suppress all

evidence obtained from his 1966 Pontiac". It is the contention of the Defendant that said evidence was obtained in violation of his constitutional rights.

It should be noted that, at the request of counsel, the hearing on and submission of this Motion was delayed in order to permit counsel to complete the taking of depositions in this case, have them transcribed and file memoranda.

At Defendant's request this Motion was assigned for oral hearing; it has been submitted on the testimony adduced at that hearing and memoranda.

No good purpose would be here served by repeating here all the evidentiary matters, oral and written contentions of counsel and all the legal authorities which were cited. As yet the complete record of the hearing has not been transcribed; it will be available to counsel and any reviewing Court. This Court is of the opinion that, to enable counsel adequate time to prepare for trial, it should not delay filing this ruling until that record is available.

Briefly, the record will reveal that the Defendant is a college graduate, was the operator-owner or part owner of two or three different business ventures and was employed as a teacher or instructor in a business college or university.

On October 10, 1967 the Defendant was at the office of the Attorney General of Ohio, Division of Criminal Activities, University Building, in Columbus, Ohio, where he was questioned about the crime charged in the instant case by various employees of that department and Sergeant Lavery, a Deputy Sheriff of Delaware County, Ohio. Following that questioning he was arrested and his car was seized.

It should also be noted that the Defendant had left his car in a public parking lot next door to the office in which he was questioned and arrested; it was seized in that lot.

The Court Reporter's record will reveal State's Exhibit I which was admitted in evidence without objection. This statement and waiver was read and signed by the Defendant prior to any statements being made by him. Defense counsel apparently raises no issue regarding this exhibit. His comments appear on the record. This Court has previously overruled Defendant's Motion to suppress any statements allegedly made by him.

The State contends the car was used in the commission of the felony charged, has evidentiary value which could have been destroyed, was legally impounded and thereafter legally searched.

It is fundamental that not all searches and seizures are illegal; the Constitutional guarantees urged by the Defendant prohibit only unreasonable search and seizure. The test is whether or not the search and seizure were reasonable considering all the facts and circumstances of the case. *Preston v. U.S.*, 376 U.S. 364, 11 L.Ed. (2d) 777. The sixth and seventh syllabi of the *Preston* case is as follows:

> "The right to search and seize incident to a lawful arrest and without a warrant extends to things under the Accused's immediate control and, *to an extent depending on the circumstances of the case, to the place where he is arrested.*
> "The rule allowing contemporaneous searches incident to lawful arrests is justified by the need to seize weapons and other things which might be used to assault an officer or effect an escape *as well as by the need to prevent the destruction of evidence of the crime.*"

The Preston case also recognizes that the reasonableness of searches of motor vehicles and other readily movable chattels which can be hidden or destroyed is not to be tested but the same inquiry which would be made in searches of homes and fixed structures. See Syllabus 4.

As to what is reasonable or unreasonable depends upon the facts and circumstances of each case. There is no fixed formula; unreaonableness cannot be stated in rigid and absolute terms. See *Harris v. U.S.*, 331 U.S. 145, 91 L.Ed. 1399; *U.S. v. Rabinowitz*, 339 U.S. 56, 94 L.Ed. 653.

Defense counsel urges that the State could have obtained a search warrant. Whether or not the warrant could have been obtained is not the test to be applied here. The test is whether or not the search was reasonable.

> "The relevant test is not whether it is reasonable to procure a search warrant, *but whether the search was reasonable*. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case." *U.S. v. Rabinowitz, supra*, at page 660. of the Law Edition Report.

Many of the cases referred to by counsel appear in various pamphlets and research aides which this Court has considered. No good purpose would be here served by repeating many of those citations. Counsel are familiar with them and to save unduly extending this opinion the pamphlets and research aides are being referred to.

The 1967 F.B.I. pamphlet "Search of Motor Vehicles" lists many cases regarding the examination of impounded vehicles. These are found at page 21 et seq. The same pamphlet refers to the many cases involving the search of vehicles incident to arrest. These are at page 33.

The Judge writing this opinion is reluctant to refer to such pamphlets in opinions and would prefer to cite and quote many specific cases. Since it is the Court's under-

standing that the pamphlet is available to all counsel it is referred to in the interest of saving time and making this ruling available to counsel as early as possible.

The most recent case revealed by this Court's independent research is *DeMarco v. Greene,* 13 O. Misc. 63 (reported in the January 29, 1968 issue of the Ohio Bar Reporter). In that December 4, 1967 decision the U. S. Circuit Court of Appeals had occasion to consider many of the cases cited by counsel in the instant case. That Court reversed the District Court for *too narrowly restricting the right of search and seizure* incident to a lawful arrest.

The DeMarco case recognizes that the Preston case, *supra,* was still good law and stated the correct rule. DeMarco, page 67. It also recognized that the Rabinowitz case, *supra,* was still the law. *DeMarco,* page 68.

DeMarco also recognized that the very recent case of *Warden v. Hayden,* 387 U.S. 294 (1967) had abolished any distinction between the seizure of mere evidentitary items and contraband, fruits or instrumentalities of crime. DeMarco, pages 68 and 69.

As a matter of fact *Warden vs. Hayden, supra,* permits the seizure of mere evidence in the course of a search incident to a lawful arrest.

The second and fourth syllabi of DeMarco are as follows.

> "The right to search and seize incidental to a lawful arrest, without a search warrant, extends to things under the accused's immediate control and, to an extent depending on the circumstances of the case, to the place where he is arrested.
> "The Fourth Amendment does not require a distinction to be made between items of only evidential value and contraband, fruits or instrumentalities of crime."

Among the authorities relied on by the State is *Cooper*

v. *California*, 386 U.S. 58 (1967). In that case the Defendant was arrested on a narcotics charge, his car legally impounded and the search of it occurred a week after his arrest. The case involved a California Statute regarding the forfeiture of the motor vehicle but many of the statements contained in that opinion bear on the question posed in the instant case.

For example the Court in Cooper, supra, points out that the Defendant was arrested on a narcotics charge and that the car was seized because of and in connection with that same crime. The Court goes on to distinguish the Preston case, supra, in which the Defendant was arrested for vagrancy and that the subsequent search of the car in that case was totally unrelated to the vagrancy charge.

At page 4 of its opinion in Cooper, supra, the Supreme Court observed that the car in that case was seized and impounded because of and in connection with the crime for which Cooper was arrested. In the instant case the car was seized, impounded and searched because of the crime for which the Defendant was arrested.

The extremes revealed in the Preston case, supra, where the car had no connection with the charge of vagrancy and those revealed in the Cooper case, supra, where the State Statute required the officers to seize and impound the car are not cases "on all fours" with the instant case. They reveal guide lines, tests and factors to be considered in the light of the facts and circumstances in the instant case.

It may be noted that, in this Court's opinion, none of the cases cited by counsel are "on all fours" with the instant case. Neither are any of those cited in 27 O.S. Law Journal, page 480, et seq.

As a matter of fact the reported cases reveal different

holdings as to the burden of proof in matters such as those before this Court. 27 O.S. Law Journal, page 520.

No good purpose would be here served by referring to the many Ohio cases dealing with the law of search and seizure. They are revealed in the Law Journal article referred to above. Many of them have been superseded by some of the Federal decisions cited earlier in this opinion.

One fairly recent Ohio case having some bearing on the question is *State v. Waldbillig*, 1 O.S. (2d) 50. This Court recognizes that it is not determinative of the instant case.

A complete record of the testimony and statements of counsel at the various hearings in this case and the memoranda on file will reveal that the State claims not only that the car was used as a means of transportation to and from the scene of the alleged crime but also that it was used to push the Decedent's automobile. Apparently plaster casts and molds of automobile tire tracks and the results of laboratory tests of samples of car paint are expected to be offered as evidence.

Again, the question is "was the seizure and search of the automobile reasonable under all the facts and circumstances of this case?" In this Court's opinion it was.

It appears to this Court that it was reasonable for law enforcement officers to immediately seize a car which their investigation gave them reasonable cause to believe had been used in the commission of the felony charged. The car was in the possession or constructive possession of the Defendant; he had the key and parking ticket for it. It was on a public parking lot adjacent to the building in which public State offices are located and where the Defendant had just been arrested.

This is not a case in which a person's home or private

structure has been unreasonably invaded. This is not a case in which an individual's person has been unreasonably searched.

In this Court's opinion the seizure of this car was incident to a lawful arrest. In this Court's opinion the subsequent search of this car was a reasonable search of a legally impounded vehicle and was incidental to the crime for which the Defendant was arrested.

The Court notes that one of the memoranda filed by the Special Assistant to the Prosecuting Attorney indicates that he is not claiming that the seizure and search were incident to the arrest of the Defendant. Under all the facts and circumstances of this case and considering that the seizure and impounding were simultaneous with the arrest, the Court can only indicate that it does not place the same interpretation on the many legal precedents here involved as does that counsel. The arrest and seizure of the car were in the same general transaction.

Every treatise which has come to this Court's attention on the subject here under consideration reveals that the law is in a state of flux. The Cooper case, supra, the Warden case, supra, and the December 1967 DeMarco case, supra, indicate to this Court that the reviewing Courts are not going to continue to so narrowly restrict the right of search and seizure.

While many of the decisions of the State and Federal Courts may not be in full accord, it is hoped that the Supreme Court of the United States will still allow the States some flexibility and permit the adoption of rules, guide lines and precedents which will effectively meet "the practical demands of effective criminal investigation and law enforcement". *Ker v. California,* 374 U.S. 23, 10 L.Ed. (2d) 726. Syllabus 12 and page 738.

It appears to this Court that under our Constitutions

and our law, the law enforcement officers in this case did what they would be expected to do by the public and the Courts. They did not invade anyone's home or private building; they did not subject any individual to any unreasonable search of his person.

Motion overruled. Exceptions reserved.

O. W. WHITNEY, JR.
Judge

cc: R. KENNETH KUNKEL, *Prosecuting Attorney*

DAVID L. KESSLER, *Special Assistant Prosecuting Attorney*

PAUL SCOTT, *Attorney for Defendant*

IN THE COURT OF COMMON PLEAS.
DELAWARE COUNTY, OHIO

Case No. 3952

STATE OF OHIO

Plaintiff,

—vs—

ARTHUR BEN LEWIS, JR.

Defendant,

JOURNAL ENTRY ON MOTION TO SUPPRESS ALL EVIDENCE OBTAINED FROM 1966 PONTIAC

The Defendant's motion filed on January 15, 1968, seeking an order "to suppress all evidence obtained from his 1966 Pontiac", after oral hearing held on January 25, 1968, and after the submission of supplemental memoranda, is hereby overruled. Exceptions reserved to the Defendant.

O. W. WHITNEY, JR.
Judge

APPROVED:
R. KENNETH KUNKEL
Prosecuting Attorney
PAUL SCOTT
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT — EASTERN DIVISION OF OHIO

STATE OF OHIO, COUNTY OF FRANKLIN, ss:

Case No.

ARTHUR BEN LEWIS, JR.
Petitioner,

— vs —

HAROLD J. CARDWELL, WARDEN, ET AL, Ohio Penitentiary
Respondent.

PETITION FOR ISSUANCE OF WRIT OF HABEAS CORPUS

Appearances:

Arthur Ben Lewis, Jr., in propria persona.

I, Arthur Ben Lewis, petitioner in the above styled cause, upon oath deposes and says that: this cause is brought in good faith and hereby petitions this Court for a Writ of Habeas Corpus pursuant to Title 28 U. S. C. A. § 2241 (c) (3). The facts setforth herein are true as he verily believes:

1. Petitioner is presently serving a life sentence for the crime of murder in the first degree, (2901.01 O.R.C.) imposed by the Court of Common Pleas, Delaware County, Ohio, on or about the 29th day of March, 1968, Case No. 3952. The petitioner was represented by retained counsel, Paul Scott, 8 East Broad Street, Columbus, Ohio, and entered a plea

of not guilty to the charge and upon submission of the cause to the jury, the jury returned a guilty verdict of murder in the first degree, with a recommendation of mercy. (Exhibit A). The petitioner was then sentenced to the Ohio Penitentiary for the rest of his life as prescribed by law. A timely motion for a new trial was filed by the petitioner, and subsequently overruled by the trial court.

2. The petitioner has exhausted his state remedies pursuant to Title 28 U. S. C. A. § 2254, in the particular posture of this cause before this court in that the petitioner perfected an appeal to the intermediate appellate court of the State of Ohio, the Fifth District Court of Appeals for Delaware County, Ohio, which court on o rabout the 6th day of February, 1968 without opinion affirmed the conviction, finding no error prejudicial to the rights of the petitioner occurring at the trial of this cause. (Exhibit B). A notice of appeal was then filed in the Supreme Court of Ohio seeking review of the decision of the Fifth District Court of Appeals for Delaware County. A notice of appeal and Memorandum in Support of Jurisdiction was subsequently filed in the Ohio Supreme Court asserting various constitutional issues. The Ohio Supreme Court on or about May 13th 1970, rendered an opinion, reaffirming the decision of the Appellate Court (Exhibit C). Thereafter, the petitioner sought a Writ of Certiorari to the Ohio Supreme Court, pro se, for a review of his conviction and judgment the Supreme Court of the United States denied certiorari on or about the 14th of December, 1970. (Exhibit D).

3. The petitioner respectfully submits, that he presents by this petition ten (10) constitutional issues

of which Nos. 5, 6, 7, 8, 9, and 10, have previously been raised in both the State Appellate and the Ohio Supreme Courts, and he raises four additional constitutional issues Nos. 1, 2, 3, and 4, not heretofore specifically raised in the State Courts, however, such issues are properly before this court in that (a) they are presented by the record and qualify under the Federal Rules of Criminal Procedure, Rule 52(b) as "plain error", and (b) they qualify under the Federal Habeas Corpus Statute, § 2254 b) to-wit: the absence of an available or adequate Ohio Post Conviction Remedy which is based on the doctrine of the Ohio Supreme Court's application of res-judicata.

4. The petitioner further contends that certain Statutes of the Ohio Revised Code are unconstitutional on their face as is more fully demonstrated for the reasons set forth in the following constitutional issues.

CONSTITUTIONAL ISSUES PRESENTED

I

The petitioner's arrest was unlawful in that it was predicated upon a warrant that had issued under Sections 2935.09, 2935.10, 2935.17 and 2935.19 of the Ohio Revised Code, which sections are unconstitutional on their face in that they:

a) fail to provide that a judicial determination be made prior to issuance of a warrant;
b) fail to provide that facts be set forth in the affidavit that would permit an impartial judicial determination as to the existence of probable cause for issuance of the arrest warrant;
c) fail to require the officer to state his source,

or to aver that such source had previously been reliable.

The subsequent eliciting of the petitioner's statements and the seizure of his automobile incident to the arrest when entered as evidence in the trial of this cause served as a basis for his conviction, contravening the petitioner's rights under the forth and Fourteenth Amendments.

II

The petitioner's interrogation and subsequent arrest and seizure of his automotive by a vigilante committee (Division of Criminal Activities — ostensibly at the direction of Deputy Sheriff Lavery) was in violation of petitioner's right of Fourteenth Amendment's procedural due process, where such committee, assigned by the Ohio Attorney General, was, in actual point of law, operating without legal authority where the Attorney General had no such statutory appointive powers and the subsequent seizure of evidence as a result of this action by the Attorney General when entered as evidence during the trial of this matter served as a basis for petitioner's conviction.

III

The petitioner's Fifth Amendment's rights were infringed where the vigilante committee (Division of Criminal Activities) summoned the petitioner to the Office of the Attorney General, initiated an interrogation of the petitioner prior to having given him the warning required by Miranda, and that when the purported warning was given, petitioner was not apprised of certain facts, ie., that anything said can and will be used against him in court,

or that an arrest warrant had been issued for his arrest, or that his conversation, prior to the warning as well as after, was being monitored by a hidden electronic eavesdropping apparatus thereby denying the petitioner his Sixth Amendment right to counsel during a critical stage of the proceedings. and the surreptitiously acquired statement when entered as evidence in the trial of the cause served as a basis of his conviction.

IV

The petitioner was deprived of a fair trial where after the trial court overruled State's Exhibit 111, the trial court erred in permitting the State to present into evidence the hearsay contents of the exhibit in toto, by means of a witness for the State reciting verbatim therefrom; such testimony serving as a basis for conviction and violation of petitioner's rights under the Sixth and Fourteenth Amendments.

V

The warrantless seizure of petitioner's automobile, parked on a private lot one-half block from site of petitioner's arrest, for purpose of ascertaining as to whether said automobile had been an instrumentality of the crime, violated Fourth Amendment prohibition where such seizure was justified only after the seizure; (in theory of the State's Case), further, the automobile was not seized contemporaneous in time and place with petitioner's arrest, and evidence seized therefrom served as a basis of his conviction.

VI

The petitioner was deprived of any chance he may have had for a fair trial where a woman, whom the State alleged, by pretrial press releases, was the petitioner's 'second wife', was issued a subpoena by the State in such flamboyant manner as to maximize newspaper, radio and television coverage and, where, this 'witness' was never called to testify: and where the State with manifest intent, branded the petitioner as a 'beast' in the eyes of the jurors, by parading her through the court room after the jury was seated, and kept her within the eyesight of the jury by the seating arrangement provided by the State of Ohio; hence, the misconduct by the Office of the Prosecuting Attorney in perpetuating the prejudicial publicity which was crucial to, and denied the petitioner's right to a fair trial and served as a basis of his conviction by denying him the right of due process under the Fourteenth Amendment.

VII

Petitioner contends that hearsay evidence of the most flagrant kind was adverted to with the manifest intent of depriving the petitioner of his right to a fair trial where the contents of an unrelated telephone call was admitted under the trial courts mis-interpretation of the hearsay rule and became a basis for conviction and constituted a deprivation of petitioner's right of confrontation and cross examination under the Sixth Amendment.

VIII

Petitioner contends that his right to a fair and impartial trial by a jury free of prejudice was im-

paired where evidence, known to be incompetent when offered, was wrongfully admitted for consideration of the jury and served as a basis of conviction violating the petitioner's constitutional rights as provided by the Fourteenth Amendment.

IX

Petitioner contends that the trial court's arbitrary limitation as to scope allowed in the direct examination of a defense witness militated against the fairness of the trial and served as a basis of the petitioner's conviction, depriving him of his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment's right to due process.

X

Petitioner contends that the trial court's denial of petitioner's Motion for a New Trial based upon newly discovered evidence was a flagrant abuse of the discretion lodged in that court and served to perpetuate petitioner's imprisonment for a crime of which he is innocent, denying him due process under the Fourteenth Amendment.

WHEREFORE, as clearly stated in the facts set forth herein, petitioner is being restrained of his liberty by the respondent in violation of the Constitution of the United States, and he therefor prays that the writ be granted and an order entered forthwith in accordance with the existing rules of this Court, promulagated by the Southern District Courts for Ohio, and that this Court take cognizance that petitioner is a layman, unversed in law, and that his petition be construed liberally. Further, this

cause is meritorious and that petitioner is entitled to redress by this Honorable Court.

CARL R. HEADLEE
Notary Public Franklin County, Ohio
My Commission Expires Aug. 1, 1972

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil Action 71-76

ARTHUR BEN LEWIS, JR.,
Petitioner,

-vs-

HAROLD J. CARDWELL, Warden,
Respondent.

RETURN OF WRIT

Respondent denies each and every allegation in this cause except such allegations as are hereinafter admitted to be true either in this Return or in the exhibits separately attached hereto.

Respondent says that as Warden of the Ohio Penitentiary he has custody of petitioner, Arthur Ben Lewis, Jr., by virtue of a certain mittimus issued by the Court of Common Pleas of Delaware County pursuant to his conviction of murder, first degree, with recommendation of mercy.

Petitioner was charged with murder in the first degree by indictment filed on November 8, 1967, returned by the Grand Jury of Delaware County. He was tried before a jury in a trial lasting from March 4, 1968, to March 21, 1968, and was found guilty with a recommendation of mercy. On March 29, 1968, he was sentenced to life imprisonment in the Ohio Penitentiary.

Petitioner pursued a direct appeal to the Fifth District Court of Appeals for Delaware County and then to the Supreme Court of Ohio. In the curernt petition, petitioner

alleges ten reasons for issuance of the writ. On direct appeal, however, only the latter six of these issues were raised.

Petitioner's first allegation is that his arrest was unlawful in that it was predicated upon a warrant issued under certain sections of the Ohio Revised Code which sections are unconstitutional on their face. Respondent submits that this claim is not cognizable in this habeas corpus action. Defects in procedure in arrest are not grounds for discharge under habeas corpus. *Fernandez* v. *Klinger*, 346 F. 2d 210 (9th Cir. 1965), *cert. denied*, 86 S. Ct. 191, 382 U.S. 895, 15 L. Ed. 2d 152; *United States ex rel. Williams* v. *Myers*, 196 F. Supp. 280. Testing the validity of an arrest made by state officers is a matter of state law in a federal habeas corpus proceeding. *Manduchi* v. *Tracy*, 350 F. 2d 658 (3rd Cir., 1965), *cert. denied*, 86 S. Ct. 390, 382 U.S. 943, 15 L. Ed. 2d 353. Furthermore, this issue has not been before the Ohio courts yet. Thus, the jurisdictional requirement of 28 U.S.C., §2254(b), concerning exhaustion of state remedies, is not met. Since petitioner was undoubtedly confined on direct appeal to those issues raised by his retained counsel, he, therefore, can make an argument that the delay in appealing this issue is reasonable, and that the right to delayed appeal exists. *Walker v. Maxwell*, 1 O.S. 2d 136.

In any event, respondent contends that petitioner's arrest was legal and founded upon probable cause. See, *Henry* v. *United States*, 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134; *McCray* v. *Illinois*, 386 U.S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62; §2935.04, Ohio Revised Code. Petitioner was arrested after extensive investigation which established the necessary element of probable cause that a felony had been committed and that it was committed by petitioner.

Petitioner's second allegation is that his interrogation and subsequent arrest and seizure of his automobile by the Division of Criminal Activities of the Attorney General's Office was in violation of his right to Fourteenth Amendment due process. Initially, respondent contends that this particular issue has not been raised in Ohio courts on direct appeal or in post conviction processes and that the jurisdictional requirement of 28 U.S.C., §2254(b), regarding exhaustion of state remedies is not met. See, *Walker* v. *Maxwell, supra.* Respondent further denies that the interrogation, arrest and subsequent seizure of evidence was unauthorize. It is also to be noted that petitioner was interrogated on his own consent and that he was arrested by a Delaware County Sheriff's Deputy.

Petitioner's third allegation is that his Fifth Amendment rights were violated in that he was interrogated prior to having been advised of his rights thereunder. This issue has not been raised in Ohio courts and respondent contends that there has been no exhaustion of state remedies as to this issue. 28 U.S.C., §2254(b). See also *Walker v. Maxwell, supra.* In any event, respondent submits there was no violation of petitioner's Fifth Amendment rights. Furthermore, this allegation amounts to no more than a conclusory allegation in that petitioner refers to "the surreptitiously acquired statement" entered as evidence and obtained as a result of his interrogation. What statement petitioner refers to and how such statement was used remains unknown to respondent. Consequently, this allegation is conclusory, and, therefore, not cognizable in federal habeas corpus. *United States ex rel. Russell v. Cavel,* 257 F. Supp. 204 (M.D. Pa., 1966); *Mohler v. Markley,* 197 F. Supp. 72 (S.D. Ind., 1961). In any event, respondent contends that petitioner was given

proper warnings and did sign a written waiver of Fifth Amendment rights. He also, upon request, was able to confer with his lawyer.

Petitioner's fourth allegation is that he was deprived of a fair trial where the contents of a state exhibit, not admitted into evidence, were admitted into evidence by the testimony of a witness who recited said contents verbatim. Respondent submits that this particular issue has not been previously raised in Ohio courts and that it too is not cognizable due to the state remedies therefore not having been exhausted. 28 U.S.C., §2254(b). See also, *Walker* v. *Maxwell, supra.* Furthermore, this allegation is too vague and conclusory to be cognizable in federal habeas corpus. *United States ex rel. Russell v. Cavel, supra; Mohler v. Markley, supra.* In any event, respondent denies that the alleged action denied petitioner a fair trial.

Petitioner's fifth allegation is that the warrantless seizure of his automobile violated his Fourth Amendment rights and that such seizure was not contemporaneous with his arrest, and that evidence seized therefrom served as a basis for his conviction. Respondent denies that petitioner's Fifth Amendment rights were violated in any way. This is so for many reasons. The seizure of the automobile is justified either as a seizure incident to a valid arrest or because there was probable cause to believe the car was an instrumentality of the suspected crime. Petitioner's car was parked approximately a half block away from where he was arrested. Petitioner knowingly relinquished the keys to the automobile and the claim ticket for the parking lot where it was parked. The Columbus Police Department was requested, however, to impound the automobile as *an instrumentality* of the crime and, accordingly, the automobile was so removed.

No property of petitioner was removed from the automobile. The only allegation given to support petitioner's assertion is that such seizure was not contemporaneous in time and place with petitioner's arrest. He also contends that such seizure was for the purpose of ascertaining whether the automobile was an instrumentality of the crime and that the seizure was justified only after the seizure.

Respondent contends that the seizure of the automobile as an instrumentality of the crime was totally justified. There were scrapings on the outside of the automobile which were believed to be from the victim's car as a result of petitioner using his car to push the victim's car, with the victim's body in it, into a river. *Harris v. United States*, 19 L. Ed. 2d 1067, reiterates the principle that:

> "It has long been settled that objects falling in the plain view of an officer who has a right to be in position to have that view are subject to seizure and may be introduced in evidence."

See, *Ker v. California*, 374 U.S. 23, 42-43; *United States v. Lee*, 274 U.S. 559; *Hester v. United States*, 265 U.S. 57; *Smith v. United States*, 2 F. 2d 715 (4th Cir., 1924); *United States v. Barone*, 330 F. 2d 543 2nd Cir., 1964) and *Lundberg v. Buckhoe*, 338 F. 2d 62 (6th Cir., 1964).

As to the allegation that the seizure was not contemporaneous in time and place with the arrest, respondent asks whether the arresting officers should have allowed petitioner to leave the interrogation, go to his car, get in the car, and then make the arrest. If so, there could be no doubt then that any search of the car would have been justified. To have required this would have been an unnecessary formality amounting to no more than a prosecutorial ruse. In any event, respondent contends that no items were seized from the interior of the car, that the evidence seized was on the exterior of the car and was

clearly visible and apparent to the arresting officers. Further, petitioner did request the interrogating officers to take custody of the car, and that in so doing, the arresting officers were legally in a position to view the scrapings which gave them probable cause to seize the car as an instrumentality of the crime which petitioner was suspected of committing.

Petitioner's sixth allegation is that he was deprived of a fair trial by the fact that petitioner's alleged second wife was subpoenaed, was never called as a witness, but was kept in the court, thus maximizing newspaper, television, and radio coverage and prejudicing the jury against petitioner. Respondent contends that this allegation does not merit habeas corpus relief and that petitioner was not deprived of a fair trial as a result of these alleged actions. Respondent further contends that this particular witness' testimony was thought necessary by the state, that it later was felt that the state's case was going well enough that this witness would likely not be called. Furthermore, petitioner was afforded ample opportunity on voir dire examination to explore the possible adverse effect of such publicity, but failed to do so. Furthermore, there is no showing that this alone effected the "totality of circumstances" to the extent that there existed lack of due process. *Sheppard v. Maxwell*, 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507.

Petitioner's seventh allegation is that his right to a fair and impartial tral by a jury was impaired where the contents of an unrelated telephone call were admitted under the trial court's misinterpretation of the hearsay rule and became a basis for conviction, depriving petitioner of the right to confrontation and cross-examination under the Sixth Amendment. Although the allegation is unspecific and vague, respondent denies this allegation. There

was admitted into evidence testimony of one Mrs. Jack Smith as to a telephone call she received July 19, 1967. The person on the other end of the line identified himself as the victim of petitioner's crime. Mrs. Smith could not identify the voice but knew it was not the victim. Respondent contends that this matter was not hearsay at all in that it was not offered for the truth or falsity of the matter asserted in the call. The fact that the statement was to be used as evidence of motive. "The requirement in the definition of hearsay is that the statement be offered to prove the truth of the matter asserted," *McCromick on Evidence*, Sec. 224 (1954), at page 661.

Also, in *Cassidy* v. *Ohio Public Service Co.*, 83 O. App. 404, at page 410, the court quotes with approval from 6 *Wigmore on Evidence*, 3rd. Ed., 185, section 1770;

> "Where the utterance of specific words itself is a part of the details of the issue under the substantive law and the pleadings, their utterance may be proved without violation of the hearsay rule, because they are not offered to evidence the truth of the matter that may be asserted therein."

The record will disclose that petitioner's counsel did, in fact, cross-examine the witness.

Petitioner's eighth allegation is that his right to a fair and impartial trial was impaired where evidence, known to be incompetent when offered, was wrongfully admitted for consideration of the jury and this same evidence was later a basis for his conviction. Respondent contends that this allegation is so vague and lacking in specificity as to amount to no more than a conclusory allegation. Accordingly, this allegation is not cognizable in federal habeas corpus. *United States ex rel. Russell* v. *Cavel, supra; Mohler* v. *Markley, supra.* This is also the situation with regard to petitioner's ninth allegation which is that the

trial court's arbitrary limitation as to scope allowed in the direct examination of a defense witness militated against the fairness of the trial and served as a basis for his conviction.

Petitioner's tenth allegation is that the trial court's denial of a motion for new trial based on newly discovered evidence was a flagrant abuse of discretion, denying him due process under the Fourteenth Amendment. Respondent submits that this issue is not cognizable in federal habeas corpus. Where a state trial court and a state supreme court, on appeal, found a state prisoner's motion for new trial and in arrest of judgment to be without merit, a state prisoner would not be entitled to federal habeas corpus for review of the merits of the grounds of such motions. *United States ex rel. Harold* v. *Myers*, 367 F. 2d 53 (3rd. Cir., 1966), *cert. denied*, 87 S. Ct. 885, 386 U.S. 920, 17 L. Ed. 2d 791. Accordingly, the question of a due process violation by an abuse of such discretion in the trial court is not cognizable in federal habeas corpus.

For the foregoing reasons, respondent finds no merit in petitioner's allegations and requests that his petition be denied. Unless the court feels that the issues can not be adequately resolved by the pleadings, respondent does not fell an evidentiary hearing is necessary under *Townsend v. Sain*, 372 U.S. 293.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil Action No. 71-76

ARTHUR BEN LEWIS, JR.,
Petitioner,

vs.

HAROLD J. CARDWELL, WARDEN,
Respondent.

PROCEEDINGS

Before The Honorable Joseph P. Kinneary, Judge, commencing on Thursday, April 20, 1972, at 9:00 o'clock, A.M.

Appearances:

Mr. Bruce A. Campbell,
On behalf of the Petitioner.

Mr. William J. Brown, Attorney General of Ohio, by Mr. Jeffrey McClelland, Assistant Attorney General,
On behalf of the Respondent.

(17-19) — PAUL SCOTT

Called as a witness on behalf of the Petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Would you state your name, please? A. Paul Scott.

Q. Where do you reside, sir? A. 4451 Raven Drive, Westerville, Ohio.

Q. What is your occupation? A. I am an attorney.

Q. Do you know Arthur Ben Lewis, Jr.? A. I do.

Q. How did you come to know him? A. I represented him in a murder case in Delaware County.

Q. Delaware County, Ohio? A. Yes, sir.

Q. How did you become involved in that case initially? A. I received a telephone call late in the afternoon from an attorney by the name of Dave Tingley.

Q. Do you remember the date? A. It was the date of the arrest.

* * * * * * * * *

Q. Would it have been October 10th, 1967, if you know? A. I believe so, yes.

Q. What did you do in response to Mr. Tingley's phone call? A. I met with Dave Tingley. We went over to the Attorney General's Criminal Investigation Section, which was located, I believe at 40 South Third Street, in the same building that the University Club is located.

Q. Is that the Division of Criminal Activities? A. That is correct. I arrived there, it must have been close to four o'clock in the afternoon.

Q. Who was present at the time that you arrived? A. Clyde Mann.

Q. Could you identify him? A. He was an investigator for the Criminal Activities Bureau of the Attorney General, a young chap that was in law school that was also associated with a division of the Attorney General; Deputy Sheriff Bill Lavery from Delaware County; I believe ex-Columbus Police Officer Jim Heise, perhaps, who is now associated with the Attorney General's Office, and several other people that I was not acquainted with.

Q. Do you know if Mr. Heise at that time was associ-

ated with the Attorney General's Office? A. I thought he was.

Q. At the time that you arrived at the Division of Criminal Activities, was Mr. Lewis under arrest, to your knowledge? A. To my knowledge he was not.

Q. Do you know when he actually was arrested. A. Yes.

Q. When was that? A. After five o'clock or five-thirty that particular evening.

Q. Did you see an arrest warrant on that occasion? A. I did.

Q. Do you know who issued that warrant? A. The then Magistrate of the Delaware Municipal Court, Thomas Clark.

MR. CAMPBELL: Your honor, I neglected to tell you that this questioning has been directed to Issue No. 1 as will this final question.

Q. (By Mr. Campbell) First of all, did you handle the Appellate cases for Mr. Lewis? A. I did. That would be the Appellate procedure through the Supreme Court of Ohio.

Q. Did Mr. Lewis at any time during the Appellate process suggest to you as an issue for possible appeal the validity of his arrest? A. Yes.

[26-30]

Q. With respect to Issue No. 5, Your Honor: At the time that you arrived at the Division of Criminal Activities Office, did Mr. Lewis give you the keys to his car? A. Not at the time, no.

Q. When did he, or did he ever? A. Yes.

Q. When did that occur? A. I believe it occurred almost simultaneously, either a little bit before or subsequent to his being placed under arrest by Detective Lavery.

Q. Did he give you any instructions as to what was to be done with the car? A. Yes.

Q. What instructions? A. I was to return the automobile to his family.

Q. Did he tell you where it was? A. Yes.

Q. Where was it? A. On a parking lot approximately a half a block; the parking lot on the opposite side of Paoletti's.

Q. That would be on Third Street? A. Yes.

Q. Did he also give you the parking lot claim check? A. Yes.

Q. What happened thereafter concerning the car keys? A. The car keys were subsequently delivered into the possession of Clyde Mann, along with the ticket.

Q. Did Mr. Lewis authorize you to turn these keys over to anyone besides his wife? A. No.

Q. How did it happen that you did turn them over to Mr. Mann? A. All right. After I arrived at the Attorney General's Office, Mr. Lewis, myself and Dave Tingley went into a conference room and we sat down and discussed, you know, tried to enlighten me as to what happened, what occurred, why he is here and what they are doing.

It was at this time that he had a briefcase in his possession—that's Mr. Lewis—and inside the briefcase there were several items of his whereabouts, his activities, and matters pertaining to his business. Most of these matters pertained to the papers that would apply to a defense of this case.

Upon leaving that conference room I was apprised that they had a warrant in their pocket for Ben Lewis, for the murder of a man by the name of Radcliffe. They requested that Mr. Lewis take a polygraph examination and I said, "Well, you know, you have already blown it. You have got a warrant."

THE COURT: You have already what?

THE WITNESS: You have already blown it. It is a slang word. If you have got a warrant for his arrest —

THE COURT: Who did you say that to?

THE WITNESS: I told Dave Kessler, I said, "If you have got a warrant for arrest, I am certainly not going to give him a polygraph examination; serve your warrant," and they served the warrant on Mr. Lewis.

At that time there was a rush of activity, everybody stood up in the room. Clyde Mann came over to me and he said, "And I want that briefcase."

I said, "You are not going to get that briefcase, that briefcase contains confidential papers that have been turned over to me by my client, and they are my papers and you cannot have them."

He said, "And I am going to take the automobile," he said, "it's down on the parking lot next to Paoletti's."

I said, "Well, Mr. Mann, I am not going to have a physical confrontation with you for that automobile. Here is the key. Here is the ticket, and I will see you in court on a motion to suppress on that."

That's the way he gained possession of the automobile.

Q. In effect he took the keys from you? A. That is correct. Well, in effect. I turned them over to him and told him that the matter will be resolved in a court of law.

Q. Did you make a motion to suppress? A. I certainly did.

Q. What was the outcome of that motion? A. Overruled.

Q. At trial was evidence presented relating to the Defendant's automobile? A. Yes, sir.

Q. What was the significance of that evidence? A. Damaging.

Q. Could you characterize it more fully?

MR. McCLELLAND: Your honor, I will object to this particular question.

THE COURT: Overruled.

A. Well, they not only took specimens of the tire tracks, treads themselves, but they took paint chips to determine the layers of paint, quality of paint, the type of paint, including all the undercoating layers right down to the bare metal.

These were analyzed by BCI and were used to establish that on the Radcliffe automobile there were flakes of paint on the rear bumper. Apparently the automobile had been pushed over an embankment by another automobile. The flaked paint that they allegedly found on the rear bumper of the Radcliffe car was of the same—strike that—was similar in texture, similar in color, and similar in layers as they found from the automobile that they seized.

The tire treads were also used to establish the similarity of the tire treads found at the scene from the first that were on Mr. Lewis's car.

Q. (By Mr. Campbell) Mr. Scott, to your knowledge was any search warrant ever issued for that car? A. Never was.

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[71]

Q. I believe on direct that we got a little mixed up about issues that were presented at the Appellate level. Did you ever question the validity of the arrest itself, the arrest warrant, the probable cause for the arrest? Did you ever question that itself at the trial level? A. No, sir.

Q. Was this a decision made in your own professional judgment? A. Yes, sir.

Q. I assume it was. A. Yes, sir.

Q. Mr. Scott, as of the latter part of 1967, the early part of 1968, how long had you been practicing law? A. I was admitted to the bar in March 1957.

Q. If you can say, what percentage of your practice is involved with criminal matters? A. about 50 percent.

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[45-48]

Q. Where was his car parked? Was his car parked on the parking lot between Paoletti's and the bank over there on Third Street, or was it the one on the corner? A. I cannot tell you that. I thought those lots were somewhat connected in the rear.

Q. I believe there is a bank between them. You can't remember where it was? A. It was approximately a half a block away from where the arrest took place.

Q. But it was a public parking lot? A. It's open to the public, if you pay.

Q. Mr. Lewis gave you the keys to his car and the claim ticket; is that correct? A. That is correct.

Q. Did he say anything to you when he gave you the keys and the ticket? A. Other than to take them home to his family.

Q. Was this a general request or was it specifically made to you? A. No, he was talking to me. There wasn't any general request. He was talking directly to me.

Q. Was he planning on you following him down to the Delaware County Sheriff's Office? A. No, I don't think.

Q. Would you have followed him down there? A. Doubtful.

Q. There was testimony regarding a briefcase with certain of his papers contained therein. I believe you

stated that Mr. Mann approached you and said, "Give me the brifecase," or "I want the briefcase," something to that effect? A. Right.

Q. Is that correct? A. That's correct.

Q. What did he say pertaining to the car keys? A. He said, "I am going to take the car too," and I said, "Under what authority?"

Q. What did he say? A. He said under the authority that it was used in the commission of a felony.

Q. Did he tell you that? A. Yes.

Q. What did you say after that? A. If my words are correct, I said, "Well, Clyde, I am not going to have a physical confrontation with you about the automobile. I will see you in court on a motion to suppress. Here is the key and the ticket."

Q. Did you give him the briefcase too? A. Oh, no.

Q. You did not? A. The reason was obvious. The briefcase was in my possession. The automobile, I wasn't certainly going to enter into a track meet and run down to the end of the corner and get the automobile and try to run from him, so I had no control over the car as such.

Q. But you did have the keys? A. Yes.

Q. There probably weren't keys in the car at the time then? A. No.

Q. So he could run down all day to the car without the keys. You can't do much with it. That's correct. A. No, they just called a wrecker and had it hauled away.

Q. Did he threaten you in any way? A. Clyde is not—no, there was no threat.

Q. Did you really foresee a possible physical confrontation? A. Well, let me say this, sir: I did not willfully turn the automobile over to Clyde Mann. It was done under protest, and I told him that I thought the best place to argue about it would be in a court of law.

Q. So, you turned it over subject to what would hap-

pen in a court of law? A. That is correct.

Q. To your knowledge was the car itself ever entered? A. Entered, what do you mean?

Q. The doors opened and the car entered? A. I don't know what happened to it.

Q. But in any event was there any evidence from the interior of the car admitted at trial? A. My recollection would be no.

Q. Your recollection, to the best of your recollection, the only evidence that was taken from the car was paint chips from the exterior surface and tire casts; is that correct? A. Well, paint chips from the interior surface too that was not visible.

Q. What do you mean? A. You couldn't see what was under the color of the paint. It was not in plain view. Certainly the layers of paint and their structure and their color of the primer was not in plain view.

Q. But it wasn't taken from the interior of the car though; the interior as laymen understand the interior? A. They didn't get it on the inside of the car. They got it on the outside of the car.

[72-73]

WILLIAM B. LAVERY

Called as a witness on behalf of the Petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Would you state your full name, please? A. William B. Lavery.

Q. Where do you live, sir? A. I live at 39 Spring Street, Delaware, Ohio.

Q. What is your occupation? A. I am currently the

Chief Deputy at the Sheriff's Department in Delaware County, Ohio.

Q. In 1967 how were you employed, sir? A. At that time I was a Sergeant in the Sheriff's Department in Delaware County.

Q. Were you the chief investigating officer in the Radcliffe murder case as far as the Delaware County Sheriff's Department was concerned? A. Yes, sir, I was.

Q. Mr. Lavery, were you present on October 10th, 1967 in the Office of the Division of Criminal Activities of the Attorney General of Ohio in Columbus, Ohio? A. Yes, I was.

Q. Was this an occasion at which Mr. Lewis was interrogated? A. Yes, that's correct.

Q. Was a recording made of the interrogation that day, to your knowledge? A. Yes, I believe it was recorded.

Q. How was it recorded? A. On a tape recorder.

Q. By whom? A. Mr. Mann.

Q. Was Mr. Lewis informed that it was being recorded? A. Not by me, sir. I don't know if he was by anyone else or not.

Q. If you know, who reduced this recording to writing? A. Well, I don't know for sure. I have an idea.

Q. Who was it? A. It would be my assumption that the secretaries there at the Division of Criminal Activities did it.

Q. Thank you. During the October 10th interrogation I would like to ask you if Mr. Lewis did a series of things.

First of all, did he make a call to the Columbus Technical Institute at approximately 12:15?

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[75-80]

MR. CAMPBELL: Your Honor, these questions I have

neglected to tell you related to Issue No. 4.

The following questions relate to Issue No. 5:

Q. (By Mr. Campbell) Prior to October the 10th had Arthur Ben Lewis been interviewed by yourself? A. Yes.

Q. Where? A. At his business known as Graham Auto Specialties, I think it was, on West Broad Street, or on the west side of Columbus some place.

Q. At that time did you ask him for a description of his car or cars? A. Yes.

Q. Did he give you such a description? A. Yes.

Q. Did he not in fact point one of them out in the parking lot? A. Yes, I believe he did.

Q. Was this the same car that was later seized? A. Yes.

Q. What kind of car was that, if you remember? A. I believe it was a gold 1966 Pontiac.

Q. Can you tell us when this occasion was that you went to Graham's Auto Specialties? A. The homicide occurred on Wednesday, July 19th. This would have been the following month. I think the 24th, I believe.

Q. Would it be fair to say then that in July— A. Definitely.

Q. —of that year you knew the description of Mr. Lewis's car? A. Yes, that is correct.

Q. Did you obtain an arrest warrant for Mr. Lewis on October the 10th? A. Yes, I did.

Q. Did you also obtain a search warrant? A. No, I didn't.

Q. Why not? A. I saw no reason for a search warrant.

Q. Did you ever obtain the search warrant? A. We did obtain one later for I believe his property, and perhaps that of his father on Dublin Road.

Q. But pertaining to the car? A. No, sir.

Q. What action was taken regarding Arthur Ben Lewis's car on October the 10th? A. After I had placed

him under arrest, and his attorney was present, I can't recall exactly what sequence but I informed him that I was going to seize the car because I had probable cause to believe it had been used in the commission of a felony, and also Mr. Lewis as I recall pulled a parking ticket from his pocket.

I am referring to a ticket that you would get at a commercial parking lot. He asked if we would take care of his car inasmuch as he was under arrest and was going to be transported to Delaware.

Q. Your testimony is that Mr. Lewis asked you to take his car? A. Yes. He asked us to take care of the car and handed a parking ticket.

Q. Where was the car? A. I believe it was in a commercial parking lot which would be the first one south of 40 South Third Street.

Q. Approximately how far from where you were and where Mr. Lewis was is this lot? A. I should say a quarter of a block.

Q. How long had Mr. Lewis been at the Division of Criminal Activities by the time that he was placed under arrest? A. I believe he arrived at 10:00 A.M. We interviewed him until approximately noon and then another investigator, Mr. Heise and I, took Lewis to his home and with his consent we searched for a shotgun. Then we returned to the Division of Criminal Activities at 40 South Third Street. I believe we had lunch.

I think we got back there at about—I am guessing on this—I think about 2:30 or 2:45, and then when I placed him under arrest and we left, I believe about 5:30 P.M.

Q. When did you obtain the arrest warrant for Mr. Lewis? A. On the morning of October 10th, 1967.

Q. Approximately what time? A. I would say about 8:00 A.M., in that area.

Q. Did you have this warrant in your possession during the entire day? A. Yes, I did.

Q. Did you tell Mr. Lewis that he was to be arrested at any time prior to his actual arrest? A. No, I didn't tell him. As I say, I think we left about 5:30 and I would say I probably informed him considerably before that, because I think when he found out he was going to be arrested, that he called his attorney, but he hadn't been informed like in the morning or anything like that.

Q. At the time he was allegedly informed of his rights, he at that time did not know that he was to be arrested? A. Well, I don't know if he knew it or not. I didn't tell him.

Q. You had not told him? A. I didn't tell him, no.

Q. You had not told him at that point that you had a warrant for his arrest? A. That is correct, I had not.

Q. Who seized the car? A. Do you mean who actually physically seized it?

Q. Yes. A. The Columbus Police wrecker. The Columbus Police Department wrecker.

Q. Who requested that that be done? A. I requested it. As I said, since I had to transport the prisoner back to Delaware, of course I couldn't do it, so I asked Mr. Mann if he would take care of it. I frankly don't know who actually called the Columbus Police Department but it would have been one of the investigators at the Division of Criminal Activities. I suppose it would be Mr. Mann.

Q. Did you later cause paint samples to be taken from the car for analysis? A. I requested that. I didn't do it myself, nor was I present when it was done.

Q. Do you know who did it? A. I believe the agent from the BCI at London, Ohio did it.

Q. That would be the Bureau of— A. Criminal In-

vestigation and Identification. As I say, I wasn't present when that was done.

Q. But it was done at your request? A. Yes.

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Cross-Examination

[84-86]

By Mr. McClelland:

Q. Mr. Lavery, I assume that you entered this case on July 19th, 1967? A. Yes, sir.

Q. When the body was discovered in Delaware County? A. That is correct, yes.

Q. Calling your attention to October 10th, 1967, who all was present in the room when Mr. Lewis was advised of his constitutional rights? A. Again, I can't recall precisely. I know Mr. Mann, myself, and of course Mr. Lewis and I believe Mr. Heise was there. I am sure about Mr. Mann and myself and Mr. Lewis. I am a little vague on who else was there.

Q. Did you see him sign a waiver of those rights? A. Yes, I did.

Q. I believe you testified that prior to October 10, 1967, you went to Graham's Auto Sales? A. Graham's Auto Specialties, I believe it was called.

Q. Graham's Specialties, and you talked to Mr. Lewis; is that correct? A. Yes, sir.

Q. This was the Monday after the Wednesday when the body was found? A. That is correct.

Q. Was Mr. Lewis a suspect at this time, or was he— A. He became a suspect at that time.

Q. At that time? A. Yes.

Q. Once again referring to October 10th, 1967, can you recall the time or at what time Mr. Lewis requested that his car be taken care of? A. I can't recall precisely,

of course, but I would say in the area of 5:00 P.M. or somewhere in that general area.

Q. Did he make this request before or after the arrival of Mr. Paul Scott? A. Mr. Scott was present when the request was made. In fact, he was standing right there beside me.

Q. Did he ever make any request before Mr. Scott arrived relative to the car? A. None that I recall, no.

Q. How did he make the request? Did he make it as a general request, of you specifically, Mr. Mann specifically? A. Not, it was just a general request. I recall he pulled the ticket out of his pocket. I think—well, I don't recall which pocket, but he pulled this ticket out and held it out and said, "Will you take care of my car?"

I don't think frankly that he was talking to anybody in particular or not precisely to me or to Mr. Mann, just all of who were standing there.

Q. What happened then after he brought the ticket out of his pocket? A. I told him to give it to Mr. Mann and that his car was going to be impounded at the Columbus Police Department impounding lot.

Q. Did you mention at that time you believe the car to be an instrumentality in the commission of a crime? A. Oh, yes, yes.

Q. Was there any kind of reaction from Mr. Scott? A. No, I don't recall any reaction.

Q. Do you recall him having any words with Mr. Mann? A. I don't recall any.

Q. Do you recall— A. I think at that time there was some question about a briefcase that Mr. Lewis had. I think Mr. Mann asked if we could look in it and Mr. Scott said no, and this was at the same time that this car thing was going on, but I don't recall any exchange of words about the car being seized.

Q. Then the car was in fact taken from the parking

lot by the Columbus Police Department wrecker; I believe that is what you said? A. Yes.

Q. Was there any evidence taken from the inside of the car? A. No, sir.

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[88-93]

THE COURT: Mr. Lavery, you have testified here this morning that Mr. Lewis had the parking lot ticket to his automobile in his pocket on October the 10th of 1967 at the Attorney General's Office on South Third Street, and during the court of your questioning; is that correct?

THE WITNESS: Yes, Your Honor, that's correct.

THE COURT: You also testified that Mr. Lewis took the parking lot ticket out of his pocket and asked if either you or Mr. Mann — you weren't sure which — could take care of this automobile since you were going to take him back?

THE WITNESS: Yes, sir, that is correct.

THE COURT: Did Mr. Lewis have the keys to his automobile also?

THE WITNES: Your Honor, I don't recall precisely, but I think he did not have the keys. I may be in error on that, but I think he did not have them.

THE COURT: Mr. Lavery, there is testimony in the record of this hearing here this morning, specifically by Mr. Scott and Mr. Scott testified that he entered physically the conference at the Attorney General's Office on October the 10th around 4:00 o'clock in the afternoon. Would that be approximately correct?

THE WITNESS: I should think that would be about correct, Your Honor, yes.

THE COURT: Sometime between 4:00 o'clock and

the time that the conference terminated, you took Arthur Ben Lewis back to Delaware; that Clyde Mann demanded Mr. Scott that he, Mr. Scott, turn over the keys to Mr. Lewis's car and the ticket to Mr. Lewis's car. Do you recall that Mr. Mann demanded that Mr. Scott turn over the ticket and the keys to Mr. Lewis's car?

THE WITNESS: No, sir, that isn't correct at all because I recall precisely Mr. Lewis removing the parking ticket and asking if some one of us would take care of his car. I don't recall the keys.

THE COURT: You do not recall Mr. Scott turning the keys and the parking ticket over to Lieutenant Mann and saying to Lieutenant Mann, "You take it and I will see you in court on a motion to suppress"?

THE WITNESS: Your Honor, I don't recall that. I recall this incident that I have testified to with the parking ticket. It occurred in the hallway there at the Division of Criminal Activities. I could even point out the exact spot.

Perhaps something like this occurred in some other room that I wasn't aware of, but I certainly don't recall.

THE COURT: It occurred in the hallway. Was this when you were on your way out?

THE WITNESS: Yes, sir, we were about to leave.

THE COURT: All right. Thank you. You will hold yourself available for further testimony.

MR. CAMPBELL: Your Honor, before the witness is excused, can I confer with my client for a moment?

THE COURT: Yes.

(Thereupon followed a conference at Petitioner's counsel table.)

MR. CAMPBELL: That is all, Your Honor.

THE COURT: One more question: Mr. Lavery, at any time between 10:00 o'clock on the date of October 10th,

1967 and until you were in the hallway and, as you testified, Arthur Ben Lewis gave you the ticket or surrendered the ticket to his car, do you know how Arthur Ben Lewis arrived or how he came to the office of the Attorney General?

THE WITNESS: I believe we did, Your Honor. Again, I would have to check.

THE COURT: Did you know his car was parked on the lot south of the office?

THE WITNESS: No, I didn't know that and I don't believe Mr. Mann did. I didn't know it personally.

THE COURT: You say you didn't?

THE WITNESS: I did not.

THE COURT: Was it your intention to confiscate his automobile?

THE WITNESS: Yes, sir. That was my intention even if he had not asked us to take care of it. It was my intention to confiscate it in any event. I just wasn't sure where it was parked.

THE COURT: For what reason?

THE WITNESS: I felt that I had cause to believe that it had been an instrumentality in this crime.

THE COURT: You would have—it was your intention to take possession of this car as an instrumentality in the perpetration of the crime, whether the car was in the parking lot on South Third Street or any other place; is that correct?

THE WITNESS: Yes, sir.

THE COURT: All right. You are excused now.

Please call your next witness, Mr. Campbell.

MR. CAMPBELL: Your Honor, at this time my only remaining witness is the Petitioner.

THE COURT: All right.

[93-97] **ARTHUR BEN LEWIS**

Called as a witness on behalf of the Petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Would you state your full name, please? A. Arthur Ben Lewis, Jr.

Q. You are the Petitioner in this action? A. Yes, sir.

* * * * * * * * *

Q. (By Mr. Campbell) Mr. Lewis, on October 10th, 1967 did you have occasion to go to the Division of Criminal Activities Office of the Attorney General of Ohio? A. Yes, sir. The previous day I received a telephone call from Clyde Mann and he requested that I come down the following day for additional questioning.

Q. Were you told any other purpose of that meeting? A. No, sir.

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Q. Were you ever told that you were to be arrested? A. No, sir.

Q. When did you actually learn that you were to be arrested? A. Shortly after between 3:30 that afternoon and 10 minutes of 4:00 when my attorney arrived at the Division of Criminal Activities.

Q. At any time during the proceedings of October the 10th were you advised of your Constitutional rights to counsel, not to testify against yourself, or any other rights? A. Prior to questioning, no, sir. I was ushered into the lobby there at the Division of Criminal Activities approximately between 10:00 and 10:15. I was told

to be seated; that they would get to me directly, and approximately between 10:25 and 10:30 A.M. I was ushered into Mr. Mann's office. Without any rights or no conversation really except good morning, I was questioned in four general areas before actually they did pull a written form, rights form, out for me to be signed.

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Q. Were you aware that there was an arrest warrant? A. No, sir, I wasn't aware of that until, as far as an arrest warrant is concerned, until it was served on me at approximately 5:30 that evening.

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[101-104]

Q. (By Mr. Campbell) Mr. Lewis, did you drive to the Division of Criminal Activities? A. I did, sir.

Q. Where did you park your car? A. In the parking lot, privately-owned parking lot adjacent to Paoletti's Restaurant, which was a quarter to a half a block away from where the Attorney General's Office was.

Q. While you were being held in the Attorney General's Office, did you have any means for getting at that car? A. I was in Mr. Mann's office the majority of the time, which didn't have any windows, and it was completely in the back end of the office there. There would be no way to have gotten at it any way.

Q. Were you ever shown a search warrant for that automobile? A. No, never.

Q. Did you ever consent to a search or seizure of that automobile? A. No, sir.

Q. Did you ever ask that it be removed by either the Attorney General people or the detectives involved? A. No, sir. I gave my keys to Paul Scott and the claim check to Paul Scott before I was arrested, sometime

between the time he arrived and I was arrested. As I remember it was probably a half hour or so before I was actually arrested, and I asked him to make sure the car was taken home so my family could use it.

Q. Did you ever change those instructions? A. Not once, no, sir.

Q. How long were you held in the office prior to the time that you were actually arrested? A. I arrived there approximately between 10:00 and 10:15, and I didn't leave until 5:30 approximately or 4:30 that afternoon when I was taken to Delaware County Jail.

Q. Prior to October the 10th, 1967 did the police officers involved have a description of your car? A. Yes, sir. When the detective Sergeant Lavery and Sam Powers of Franklin County, their initial investigation approximately a week after the incident, the Radcliffe murder, in their initial investigation they asked me what kind of car I had. I told them. In fact I said there it is, sitting out there on the lot. They asked me the color of it, and I told them it was beige with a dark top.

Q. Were they in a position to observe for instance your license plate number? A. Yes.

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Cross Examination

By Mr. McClelland:

Q. Mr. Lewis you were invited to go down to the Attorney General's Office; is that correct, on October 9th you were invited? A. I would say it more was put to me as a form of a request to come down for additional questioning.

Q. It was not a demand? A. It was not a demand, but

it was a request more than an invite; some place in between there I would say.

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[108-110]

Q. At what point did you decide you better get a lawyer? A. Is when I requested one at approximately 12:10.

Q. 12:10? A. Yes. That was when I first requested one, and this is the part that's deleted out of the transcript.

Q. This is deleted out of the transcript? A. Yes.

Q. What was the reaction to—I assume you requested — A. It was all in the same sentence, as I stated before. I was concerned that I was going to have approximately 50 young adults at Columbus Technical Institute that weren't going to have a teacher at 12:35 when I was due to a class over there, and so that was a concern. I requested Mr. Mann that I thought that I probably ought to get an attorney, and I needed to use the toilet facilities; I would like to grab a bite to eat because I hadn't eaten since the night before, and I would like to make some arrangements or teach my class or make some arrangements to teach those classes that afternoon, and that I would come back approximately at 2:00 o'clock or 2:15 with my attorney for additional questions or any other activities they had in mind.

Q. What was his response? A. He said no. Then after some argument he did relent to let me make a call to Mr. Hammond of Columbus Technical Institute to arrange for somebody to teach my class. Then I immediately said, after I hung up, "Well, how about letting me call my attorney at this point?"

He said, "You have already made your one telephone call," and kept going.

Q. What time did you call Dave Tingley then? A. Approximately 3:30.

Q. What apparently changed Mr. Mann's mind or Mr. Lavery's or Mr. Kessler's, those present in the room? A. You would have to ask them, sir. I don't know.

THE COURT: Just let me as you: Did you ask them again for permission to call an attorney?

THE WITNESS: At 3:30, sir?

THE COURT: Yes.

THE WITNESS: Yes, sir.

THE COURT: What did they say?

THE WITNESS: Yes.

Q. (By Mr. McClelland) Did you hear Mr. Lavery testify that in the course of that day you returned with him to your home? A. I am sorry?

Q. Did you hear Mr. Lavery testify this morning that in the course of that day you, along with Mr. Lavery, returned to your home to search for a shotgun? A. Yes, I think he has the time all balled up on that, but it was approximately at 1:00 o'clock instead of 12:00 as he testified to, and we did go to my home voluntarily. I consented. I didn't know where the shotgun was that I had, and I consented to go, and we were there approximately an hour, hour and a half and came back then, and some questionings were resumed; shortly after that then I asked for the attorney and they permitted me.

THE COURT: Up until the time you asked for the attorney around 3:30, were you aware that Sheriff Lavery had a warrant for your arrest?

THE WITNESS: No, sir. That was never told to me until actually between 3:30 and the time my attorney arrived; that they said—I asked them "Are you finally going to get around to putting me under arrest?"

They said, "Yes," but even then I didn't know there

was an arrest warrant issued; not actually 5:20, 5:30 when they served it on me, sir.

Q. Did you ever ask anyone if you were under arrest? A. I think it was after 3:30 actually.

Q. At least the purpose of the question, did you ask what the purpose of all this questioning was? Mr. Lewis, you are a smart man. I find it hard to believe that you would have subjected yourself to this without at least inquiring as to what was going on.

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[113-114]

Q. You did specifically request Paul Scott to take your keys and the claim check; is that right? A. Yes, sir, gave it to him.

Q. It was not a general request? A. No, sir, no way.

Q. You gave them specifically to him? A. Yes.

Q. What did you say to him when you gave them to him? A. I would like for you to see that my automobile, which is parked in the parking lot on the other side of Paoletti's Restaurant, would be removed to my home so my family might have use of it.

Q. Another question about the parking lot itself: That parking lot is pretty crowded, isn't it? A. Yes, sir.

Q. Fairly narrow space for a lot of cars? A. Yes.

Q. In the course of the whole time you were at the Attorney General's Office could you come and go as you pleased? A. No, sir.

Q. Did you ever try? A. Yes, sir, at 12:15 when I requested—12:10, 12:15 area, when I requested to go to contact an attorney and take care of my classes and this sort of thing, I asked to leave. I got up as if I were to leave and I was stopped from leaving.

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DAVID KESSLER

[117]

Direct Examination

By Mr. McClelland:

Q. State your full name, please? A. David L. Kessler.

Q. What is your occupation? A. Attorney-at-Law.

Q. What is your address? A. Office address, 50 West Broad Street.

Q. Were you an attorney-at-law in the latter part of 1967 and the early part of 1968? A. Yes.

Q. How were you employed at that time? A. I was employed as an Assistant Attorney General under William Saxbe, State Attorney General.

Q. Specifically what were your duties with the Attorney General at that time? A. At that time I was the Chief of what was called the Division of Criminal Activities.

Q. Did you have an occasion to act as an Assistant Prosecuting Attorney in the case of The State of Ohio versus Arthur Ben Lewis, Jr.? A. Yes.

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[122-129]

Q. (Br. Mr. McClelland) Mr. Kessler, were you present in the office when Mr. Lewis relinquished his keys to his car and the claim check to get the car out of the parking lot? A. I can only answer it this way: I was around the office. As far as me being present when there was a conversation, if there was, I don't remember it. I have been trying to think about that, and I have to say that I wasn't physically there when this took place.

Q. So, you don't specifically remember? A. No I

don't specifically remember it. If I was there, I don't remember that.

Q. Did you represent the State as an Assistant Prosecuting Attorney during a motion to suppress evidence obtained from that car? A. Yes, sir.

Q. Do you recall whether or not Mr. Lewis ever took the stand to deny that he gave his consent to Mr. Mann's taking the keys and the claim check? A. I don't recall Mr. Lewis ever taking the stand. If he did, I don't remember it.

CLYDE MANN

(122-129)

Called as a witness on behalf of the Respondent, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McClelland:

Q. State your full name, please? A. Clyde H. Mann.

Q. Your address? A. Dublin, Route 1, Summitview Road.

Q. Are you employed, sir? A. Yes.

Q. What is your occupation? A. Security Officer with The Ohio National Bank.

Q. How were you employed in the middle until late 1967 on into 1968? A. Attorney General's Office.

Q. What was your specific duty with the Attorney General's Office? A. In the Division of Criminal Activities.

Q. Your were Chief Investigator; is that correct? A. Yes.

Q. Did you and did the office have an occasion to become involved in an investigation and prosecution of the Petitioner in this case, Arthur Ben Lewis? A. Yes.

Q. What were the circumstances of the involvement,

of the office's specific involvement? A. The Delaware Sheriff's Office asked us to assist them in the investigation of the murder of Mr. Radcliffe.

Q. You did so assist them? A. Yes.

Q. Mr. Mann, were you present in the Attorney General's Office physically on October 10th, 1967? A. Yes, sir.

Q. During an investigation of Mr. Lewis by yourself? A. Yes.

Q. Who else was present during the investigation? A. Mr. Lavery and Mr. Heise. I don't recall who else might have been there.

Q. Mr. Mann, handing you what has been marked as Respondent's Exhibit B, is your signature affixed thereon as a witness? A. Yes.

Q. Do you notice the time up in the right-hand corner of the page? A. Yes, sir.

Q. What is that time? A. 10:40 A.M.

Q. Was the statement actually signed at 10:40 A.M.? A. Yes, it was.

Q. Mr. Mann, do you recall at the trial of Mr. Lewis reading into the transcript the transcription of this investigation which I have referred to? A. Yes.

Q. Was the transcription accurate? A. Yes.

Q. That is chronologically? A. Yes.

Q. It was an accurate transcription of the recording? A. Yes.

Q. Was the recording an accurate recording of the investigation itself? A. Yes.

Q. Calling your attention to later in the day of October 10th, 1967, specifically do you recall Mr. Lewis ever requesting you to take care of his car and his claim check? A. Yes.

Q. Was this before or after Mr. Scott had arrived? A. This was after Mr. Scott arrived.

Q. Also let me ask you: At any time prior to approximately 3:30 did Mr. Lewis ever request an attorney? A. No, not that I recall.

Q. Therefore you did not refuse a request to see an attorney? A. No.

Q. But at 3:30 he did request an attorney, approximately 3:30? A. Yes.

Q. The attorney was Dave Tingley, I believe? A. Yes.

Q. Getting back to later on in the afternoon, could you relate the circumstances of your taking the car keys and the claim check? A. At the time the warrant was served by Mr. Lavery—

THE COURT: Mr. Mann, let us put this in the reference of time and place within the building. Where did it take place and at what time within the building?

THE WITNESS: To the best of my knowledge approximately 5:00 P.M. It was in our office in the hallway of our building, which is on the ground floor.

THE COURT: Is this the hallway—there is a hallway that you enter from Third Street; isn't there?

THE WITNESS: Yes. Let me clarify that. This is a hallway inside our office, inside.

THE COURT: But it did not take place in the room in which the investigation was conducted?

THE WITNESS: No.

THE COURT: This was about 5:00 P.M.?

THE WITNESS: To the best of my knowledge.

THE COURT Go ahead.

Q. (By Mr. McClelland) Once again would you relate specifically what occurred when he relinquished the possession? A. As I recall Mr. Lewis stated, "Would you take care of my car?"

At that time he handed me the claim check to the parking lot. I don't know if the keys was handed to me or anything about the keys.

As I recall they could have been in the car or he could have handed them to us. I don't know.

Q. The claim check was handed directly to you by Mr. Lewis? A. To the best of my knowledge, it was.

Q. Did you recall any particular confrontation you might have had with Mr. Paul Scott at that time? A. Concerning.?

Q. Let me ask you this then: Was there a briefcase? Did Mr. Lewis have a briefcase with him? A. Yes.

Q. Do you recall any confrontation with Mr. Paul Scott regarding the briefcase or the claim check or car keys? A. I recall that we asked to take possession or look into Mr. Lewis's briefcase.

THE COURT: You asked Scott?

THE WITNESS: Yes.

THE COURT: Did Mr. Scott have physical possession of this briefcase at the time you asked that?

THE WITNESS: I think Mr. Lewis had physical possession, and I was going to say, I don't know if I asked Mr. Lewis or Mr. Scott. They was both there together, and I asked if I could have this briefcase, and that was the only words that we had.

Q. (By Mr. McClelland) Did he respond to you at all? A. Yes. He said absolutely not; that I could not have the briefcase.

Q. But you already had the claim check in your possession? A. Well, this was all within a few seconds of each other, so I couldn't say I had the claim check first.

THE COURT: Did you ask for the keys and the claim check, or were they volunteered to you?

THE WITNESS: Mr. Lewis asked me to take care of the car. He handed over the claim check. As I say, I don't recall the keys.

THE COURT: All right. Go ahead.

THE WITNESS: Then I asked about the briefcase.

THE COURT: What then happened to the car?

THE WITNESS: It was picked up by the Columbus Police Department wrecker.

Q. (By Mr. McClelland) And impounded? A. And impounded.

Q. Did you believe the car to be—I will ask it this way: What was your purpose in wanting the car? A. I believed that this car was used in a felony. That is the reason we wanted it.

Also, we wanted the plaster casts of the car that was on the car.

Q. But he did make the request of you to take care of the car? A. Yes.

MR. McCLELLAND: Thank you, Mr. Mann.

THE COURT: Before you cross-examine, Mr. Mann: You were present during the entire day, were you not, on October the 10th, 1967 when Arthur Lewis was questions; is that correct?

THE WITNESS: Yes.

THE COURT: Were you aware that there had been a warrant issued for his arrest early that morning in Delaware, Ohio?

THE WITNESS: Yes.

THE COURT: You have just stated, I believe, that if Mr. Lewis had not asked you to take care of his car and handed you the claim check and maybe—maybe not—the keys, that you would have taken possession of it anyway; is that correct?

THE WITNESS: Well, I think we would have had a consultation with our attorney, which was Mr. Kessler, to decide that point, but this did not.

THE COURT: Didn't you know throughout the whole day that you wanted this car and that you regarded

this automobile as an instrumentality of the crime, and you just said that you wanted to take the impression of tires. You knew that throughout the day; didn't you?

THE WITNESS: Yes, sir.

THE COURT: You did not talk to Mr. Kessler about it during the day; did you?

THE WITNESS: Your Honor, I don't recall that particular part.

THE COURT: So, if Arthur Ben Lewis had not, as you have testified here, surrendered possession of the car to you by giving you the claim check and asking you to take care of it, you would have taken possession of the car nevertheless; wouldn't you?

THE WITNESS: We probably would have, yes, sir.

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[134]

WILLIAM LAVERY

Having been previously duly sworn, resumed the stand and testified as follows:

Direct Examination

By Mr. McClelland:

Q. I believe you have already been sworn. Will you state your name for the record?

THE COURT: The record will show that the witness William Lavery is now called as a Respondent's witness on direct examination.

MR. McCLELLAND: Thank you, Your Honor.

Q. (By Mr. McClelland): Mr. Lavery, regarding the seeking of an arrest warrant on the morning of October 10th, 1967; do you recall that? A. Yes, I do.

Q. Who was the Magistrate before whom you sought it? A. Judge Thomas C. Clark.

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[138-143]

THE COURT: Why don't you withdraw your question and why don't you ask him what information he had based upon his own investigation at the time that he made the application to the Magistrate for the issuance of the warrant?

MR. McCLELLAND: All right.

THE COURT: That was around eight o'clock in the morning; wasn't it?

THE WITNESS: Yes, sir.

Q. (By Mr. McClelland) Mr. Lavery, at around eight o'clock in the morning of October 10, 1967, what information did you have to seek—behind the affidavit to seek a warrant for Mr. Lewis's arrest, based upon your investigation? A. My probable cause was based on the following facts: First, that a witness who lived near to the scene of this crime had heard shots on the morning of the homicide, and when she looked out the window she saw what she described to me as a gold colored General Motors vehicle leaving the area of the homicide and going south on State Route 315.

Of course Mr. Lewis at that time did in fact own a gold 1966 Pontiac.

On the car of the victim of this homicide, which had been pushed over an embankment at the scene, paint, foreign paint was found on the bumper of that car. From the tire tracks and other evidence at the scene, it was obvious that another vehicle had pushed Mr. Radcliffe's vehicle over this embankment and obviously had been damaged, leaving paint on his bumper.

This foreign paint was removed, samples taken and forwarded to the FBI laboratory. They reported to me

that this paint was—I think they narrowed it down to about a two-year period off of either like '65 or '66 General Motors products, and they gave the factory name for this paint.

For example, on an Oldsmobile it might be called mist gold, whereas on a Pontiac it may have another name, but it was still the same paint.

Among this data furnished me by the FBI, that it could have possibly been a gold colored 1966 Pontiac, so that was another reason.

Probably the biggest reason that I had was that during the course of my investigation I found that a Mrs. Smith, who was the wife of the Mr. Smith who was negotiating to buy Graham Auto Specialties, had received a telephone call on the morning of July 19, 1967, somewhere between the hour of 9:00 A.M. and 9:30, and the caller identified himself as Mr. Radcliffe and said the books for Graham Auto Specialties were A-1; that the business deal should go through. They should go ahead and buy the business and that he, meaning the caller who purported to be Mr. Radcliffe, was leaving town and would not be back until the following week.

Well, my earlier investigation had indicated that Mr. Radcliffe had been murdered at about 8:30. This had been established by the time he left home, how long it would take him to get there, and mostly by the witnesses in the area of the scene who heard the shots, so it was established that he had been killed around 8:30.

This phone call that Mrs. Smith received was some half an hour to 45 minutes later, so obviously Mr. Radcliffe couldn't have made it since he was already dead.

I deduced from that that the person who made the call very likely was the killer, and the only person who would stand to gain from making that call in my opin-

ion was Arthur Ben Lewis, Jr., so these were the reasons that I felt I had probable cause to seek this warrant to arrest.

One other thing too, I am sorry I forgot: I also had information at the time that Mr. Lewis's 1966 Pontiac had been taken into a body shop shortly after the day of this killing for repairs on the front end and parts of the body, the body of the car.

Q. Had you done any investigation in the office of Mr. Radcliffe? A. Yes. Yes, I had been in there many times, and in his records and so forth I of course had found Arthur Ben Lewis, Jr.'s name.

Q. Were there any clues therein specifically that you could recall? A. There was a calendar, a desk-type calendar, and the page for July 19th was missing, but there was an indentation on the next page and this was taken to a laboratory and I think BIC—although it may have been the FBI lab—and their analysis of that indicated that the name Ben Lewis had been written on the page for the 19th.

Q. These, I assume, were then the background facts which led you to believe that Mr. Arthur Ben Lewis had committed the murder of Paul Radcliffe; is that correct? A. Yes, sir.

Q. Calling your attention again to October 10th, 1967 at the Attorney General's Office, Division of Criminal Activities, did you believe Arthur Ben Lewis's car to be an instrumentality of the crime? A. Oh, yes; not just a mode of transportation to and from, but actually involved in the commission of the crime.

Q. Mr. Lavery, if that car had been any place other than a public parking lot, absent his consent to take the car, would you have seized that car? A. Yes, sir, I would have sought it out and seized it at my earliest convenience.

Q. Would you have seized it absent a warrant had it been anywhere other than a public parking lot? A. I possibly would have discussed that with my prosecutor, but I would have seized it. I can't say I would have done it without a warrant. I would have discussed it with my prosecuting attorney first, but I had every intention of seizing it one way or other.

Q. But in any event you did have his consent to take care of the car; is that correct? A. Yes.

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Cross Examination

[144-147]

By Mr. Campbell:

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Q. You say that you would have seized the car in any event. Are you testifying that at the time you went to the Magistrate in Delaware early in the morning of October the 10th, that you at that time already had sufficient evidence to believe that the seizure of that car was justified? A. I felt I probably did, but I wanted to wait until this interview with Mr. Lewis concluded that day to see what developed, and we did in fact of course ask him about the damage to the car and so forth.

Q. Why didn't you apply for a search warrant at the same time? A. As I say, I wanted to wait until after this interview and see if my opinion changed either one way or other regarding the car.

* * * * * * * * *

THE COURT: What developed in the course of your investigation on October the 10th that strengthened your belief that Lewis's car was an instrumentality of the crime and therefore under any circumstances you would seize it?

THE WITNESS Well, he admitted that it had been damaged, and he told us that it had been done while parked on a street. In fact I think on Third Street or perhaps in the alley behind Third Street. He admitted that it had been damaged.

Our prior investigation at the body shop where he took it indicated that when the employees there asked him how this damage occurred, he said, "My wife hit a fence."

THE COURT You knew that he had taken it to a body shop before you started to question him on October the 10th; didn't you?

THE WITNESS: Yes, sir.

Supreme Court of the United States

No. 72-1603

Harold J. Cardwell, Warden,

Petitioner,

v.

Arthur Ben Lewis

ORDER ALLOWING CERTIORARI. Filed December 3 ---------- , 1973.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth ---------- Circuit is granted.